Filed 2/22/10 Ringhof v. Newman CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JACKIE WARNER RINGHOF, Plaintiff and Respondent, v. JOHN F. NEWMAN, Defendant and Appellant.	2d Civil No. B209634 (Super. Ct. No. CIV245520) (Ventura County)

Plaintiff's property was damaged and she suffered personal injury when her home was hit by a mudslide. The jury awarded her economic and noneconomic damages. On appeal, the defendant contends there is no substantial evidence to support the jury's finding that he caused plaintiff's damages. He also contends the trial court erred in refusing to instruct the jury that noneconomic damages are limited to those arising from personal injury and are not available for property damage.

We conclude that the judgment is supported by substantial evidence. But we agree with the defendant that the trial court erred in instructing on noneconomic damages. We remand for new trial limited to noneconomic damages.

FACTS

The Casitas Springs area of Ventura county is part of the Fresno Canyon watershed. The area is prone to mud and debris flows.

The properties here are on a spur of Nye Road in the Casitas Springs area. Although the spur is officially part of Nye Road, it is sometimes informally called Cash Road. The spur is owned by John F. Newman, but homeowners along the road have easements over the spur for access to their properties.

In the 1960s, Johnny Cash built a house at 8736 Nye Road on the most northerly portion of the Cash Road spur. It is uphill from plaintiff's properties. Newman purchased the parcel in 1973. In 1987, Newman built a second house on the parcel. After he built the second home, he obtained a lot split. The second house became 8744 Nye road. That lot was approximately two-and-a-half acres and included the Cash Road spur. From 1973 to 2000, Newman lived in one house or the other. During that time, he saw several debris flows move down the Cash Road spur.

When Johnny Cash built his house, he paved the Cash Road spur. As originally graded, the spur contained dips. Newman alone maintained the spur. Pursuant to an easement agreement, the dominant owners paid Newman to maintain it. He did not remove all the debris after the mud flows. He simply smoothed out the debris, leaving most of it on the spur. Over time, the dips in the road filled in. This left some properties that had originally been level with or above the road, below the road grade.

Myron Kroeger and Jackie Ringhof each owned a parcel that was below the grade of the spur road. Both Kroeger and Ringhof complained to Newman about the height of the road, pointing out that it jeopardized the safety of their properties. Newman told Kroeger, "It is no concern of mine."

Around 1985, Ringhof and her neighbors started creating berms along the road to protect their properties from the mud flows. Photographs taken before the mud flow show the berms. Newman recalled seeing the berms and estimated their height at two-to-three feet.

In 2003 or 2004, Newman began the process of building a second residence on his lot at 8744 Nye Road. That residence ultimately became 8722 Nye Road. Newman hired a licensed contractor, Kelly Ranuio, to build the residence. Ranuio did not contract to build the residence at a set price. Instead, Newman paid him by the hour,

plus a charge for his "overhead." Newman determined the size, design and location of the house.

Originally, the Cash spur was 25 feet wide its entire distance. The building pad for Newman's new residence extended five feet into the roadway. Because the pad was higher than the road, the pad had to be extended into the roadway to prevent the pad from sloping too steeply. Ranuio also piled dirt from the construction site on the roadway, also narrowing the road.

Ranuio removed the berms from the side of the Cash spur. Ranuio testified there was no place to park, He cut the berm down to six or eight inches to create parking for himself and his subcontractors.

In November 2004, Ranuio received a stop work notice from the County. Ranuio testified that the notice required him to create berms and swales with sandbags and to restore the disturbed easement. The County sent Newman a letter dated December 1, 2004. The letter advised Newman that the County has received a number of complaints from area residents pertaining to damage to neighboring fences and retaining walls from grading activities.

Newman visited the work site up to January 2005. He claimed, however, that the frequency of his visitation was hampered by the flu. At the time, Newman was living in Camarillo.

A severe storm hit the area on January 9 and 10, 2005. It triggered a debris flow that inundated Kroeger's and Ringhof's homes. During the debris flow, Ringhof escaped her home through the bathroom window, injuring her back and hips. She required care for her injuries.

Glen Hawks testified as plaintiff's expert. Hawks is a registered civil engineer, who specializes in hydrology and flood plane development. He prepared flood insurance maps for the Casitas Springs area in the 1970s. In 2006, he did a study of flooding, debris, and mud flow in Fresno Canyon for the County. By comparing topographic maps, Hawks described how over the years the contours of the Cash spur changed. The road became higher and of a more uniform grade. He testified that water

flowing down a more uniform grade will carry debris better and transport it without dropping it. Water has a tendency to drop debris when there is a change in grades.

Hawks estimated that a maximum of 900 cubic yards of debris flowed out of the Canyon during the storm ending on January 10, 2005. He estimated the velocity of such a flow at 75 cubic feet per second. He said a roadway 25 feet wide could handle 150 cubic feet per second at one foot in depth.

Kroeger and Ringhof presented the question of liability to the jury under two theories: that Newman was liable for the diversion of surface waters and that he was liable for the negligence of his contractor under the peculiar risk doctrine. The jury found Newman liable under both theories.

The jury awarded Ringhof $554,806.40 in economic damages and $350,000 in noneconomic damages. Kroeger's judgment against Newman has been satisfied and he is not a party to this appeal.

DISCUSSION

I

Newman contends the judgment is not supported by substantial evidence.

"In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. [Citation.] The trier of fact is not required to believe even uncontradicted testimony. [Citation.]" (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

An upper property owner may be liable where he fails to exercise reasonable care in the use of his property so as to avoid injury to adjacent property through the flow of surface waters. (*Keys v. Romley* (1966) 64 Cal.2d 396, 409.) It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce injury. (*Ibid.*)

Newman argues there is no substantial evidence his actions caused any harm to Ringhof. A defendant's negligence is a cause of injury or damages when it is a substantial factor in bringing about the injury or damage. (See *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1048-1054.)

The evidence showed that Newman graded the road so as to place Ringhof's property below the grade; removed the dips in the roadway so that mud and debris flowed unimpeded; narrowed the roadway; and allowed his contractor to destroy a protective berm. In short, it is hard to imagine what else he could have done to ensure that Ringhof's property was inundated in the event of a mudslide. A reasonable juror could conclude that any of those actions was a substantial factor in bringing about Ringhof's injuries and damage to her property.

Newman relies on the following cross-examination of Ringhof's expert, Hawks:

"Q. Is it your opinion then that had the changes you document on the pad elevation and the road elevation not occurred, had this same 2005 slide occurred when the topography looked like it did in your 1968 to '72 topo, is it your testimony that there would have been no damage to either the Ringhof property or the Kroeger property?

"A. Not at all. I never said that.

"Q. Do you know how much damage they would have had?

"A. It would have been less. There might have been none. I don't know."

Hawks's testimony is that the changes in topography caused some damage. He said had the changes not occurred, the damage would have been less and might have been none. Hawks's statement, "I don't know" relates to, "There might have been none." That other concurrent causes may also have been responsible for damage will not relieve Newman of liability. If a defendant's negligence was a substantial factor in causing the harm, he cannot avoid responsibility because some other person, condition or event was also a substantial factor. (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1025.) Newman's actions in changing the topography are alone sufficient to support causation.

In any event, the evidence also supports a finding that Newman is liable for his contractor's action in destroying the berm. At common law, a person who employed an independent contractor was not liable for the contractor's negligence. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 693.) The rule has so many exceptions, however, that it is now primarily important as a preamble to its exceptions. (*Ibid.*) One of the exceptions is the doctrine of peculiar risk. (*Ibid.*)

Under the peculiar risk doctrine, "[l]iability is placed upon those who directly or indirectly employ independent contractors to do work which the employer should recognize as likely to create during its progress some peculiar unreasonable risk of harm to others unless special precautions are taken and the employer fails to provide these precautions or see to it the subcontractor provides precautions. [Citation.]" (*Mackey v. Campbell Const. Co.* (1980) 101 Cal.App.3d 774, 784.) "A peculiar risk is one that arises out of the character of the work to be done *or the place it is to be done* and against which a reasonable person would recognize the necessity of taking special precautions." (*Id.* at p. 785, italics added.)

Here Newman hired an independent contractor to do construction, including grading work, in an area known for mudslides. Causing or exacerbating mudslides was a peculiar risk of the work. Far from taking reasonable precautions, Newman stood by while his contractor made matters worse by destroying a protective berm.

Newman argues there is no substantial evidence that the work performed by his contractor posed a special danger that Newman knew or should have known. But Newman was aware the area was prone to mudslides. Anyone familiar with the history of the area would know that the destruction of a protective berm would place persons and property at risk. Newman did not have to be an expert to know of the special danger.

Newman argues that Ringhof has not identified an avoidable risk inherent in the work itself that caused her injury. But the risk is obvious. It is the risk of personal injury and property damage from a mud slide. It arises from doing grading work in a slide-prone area and destroying a protective berm. Hawks, Ringhof's expert, estimated a

roadway 25 feet wide could accommodate the mud flow at about one foot in depth. Newman testified that the berm prior to its destruction was two to three feet high. Thus the jury could reasonably conclude the destruction of the berm was at least a contributing cause of the damage.

Newman argues that his contractor's negligence was collateral to the work he was performing. Under the peculiar risk doctrine, the employer of an independent contractor will not be liable for mere "'casual'" or "'collateral'" negligence. (See *Smith v. Lucky Stores* (1976) 61 Cal.App.3d 826, 830.) Casual or collateral negligence is negligence that does not involve the risk that made the work particularly dangerous. (*Ibid.*) Thus where the peculiar risk involves lowering a sign from the top of a building, the employer will not be liable for injuries caused by the sign once it is placed on the ground. (*Ibid.*) Similarly, the doctrine of peculiar risk does not involve routine types of negligent conduct such as the misuse of a hand tool by a contractor or its employees. (*Stark v. Weeks Real Estate* (1979) 94 Cal.App.3d 965, 971-972.)

Newman argues the negligence is collateral because there is no evidence that destroying the berm was part of the plan to build a guest house. But liability may arise even though the employer has no reason to anticipate conditions requiring special precautions at the time he lets the contract. (*Mackey v. Campbell Const. Co.*, *supra*, 101 Cal.App.3d at p. 784.) The employer will be liable if he knows or should know that such conditions have arisen during the course of the work. (*Ibid.*)

Here Newman admitted he visited the work site up to January 2005. In addition, the County sent him a letter in December 2004 advising him of complaints from neighbors about grading activities. The jury could reasonably conclude he was aware of his contractor's destruction of the berm and the danger of damage from mudslides. Yet, Newman took no precautions. Newman's contractor's negligence in destroying the berm was not collateral to the risk of damage from mudslides. It enhanced the risk.

Substantial evidence supports the jury's finding that Newman caused the damage to Ringhof and her property.

II

Newman contends the instruction on noneconomic damages is incorrect. He claims the jury should have been instructed that noneconomic damages are limited to those arising from personal injury, not property damage. Instead, over his objection, the jury instruction on noneconomic damages contained no such limitation.

"No California case has allowed recovery for emotional distress arising solely out of property damage, unless there was a threshold showing of some preexisting relationship or intentional tort." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1032, pp. 321-322, citing *Cooper v. Superior Court* (1984) 153 Cal.App.3d 1008, 1012.) Here Ringhof points to no special relationship on which liability can be found, and the trial court found no evidence of an intentional tort.

Ringhof attempts to distinguish cases in which damages for emotional distress was denied on the ground that she was present when her property was destroyed. But she cites no authority to support her argument that the owner's presence is a distinguishing factor.

Ringhof cites cases approving an award of noneconomic damages in the absence of physical injuries, where the damages were caused by a trespass or nuisance. (See *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 337, and cases cited therein.) But Ringhof's case was submitted to the jury on negligence. Ringhof did not plead trespass or nuisance. We cannot uphold a judgment on a theory that was not submitted to the jury. (*Border Business Park, Inc. v. City of san Diego* (2006) 142 Cal.App.4th 1538, 1560.)

Ringhof's reliance on Civil Code section 1431.2, subdivision (a) is misplaced. That section provides that liability among defendants for noneconomic damages is several and not joint. The section speaks only to apportionment of liability among defendants. It does not create or expand liability.

Nor is the error harmless. Ringhof argued to the jury that she is entitled to noneconomic damages arising from the destruction of her home and property. It is impossible to say how much of the award for noneconomic damages is attributable to

property damage and how much is attributable to Ringhof's personal injuries. It is reasonably probable, however, that the award would have been more favorable to Newman had the trial court instructed the jury that noneconomic damages are limited to those arising from personal injuries. Thus, the error was prejudicial. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570.)

The award of noneconomic damages is reversed and remanded for a new trial. In all other respects, the judgment is affirmed. Each party is to bear his or her own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Thomas J. Hutchins, Judge

Superior Court County of Ventura

Horvitz & Levy, David M. Axelrad, Michael Bacchus, James A. Sonne, Vail & Stub, Stub, Boeddinghaus & Velasco, Gerald B. Velasco for Defendant and Appellant.

Law office of Robert I. Long, Robert I. Long for Plaintiff and Respondent.